Supreme Court, U.S.
FILED
OCT 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-490

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN M. JAY,

Petitioner,

vs.

BRUCE SUCHER, JOHN SANDS, DEE HAIL, GARY JACKSON, KEN POFF, DONALD EVERS, and the CITY OF VANDALIA, OHIO,

Respondents.

OPPOSITION OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

David P. Williamson*
Attorney for Respondents
BIESER, GREER & LANDIS
400 Gem Plaza
Third and Main Streets
Dayton, Ohio 45402
(513) 223-3277

*Counsel of Record

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

13 pp

QUESTION RESTATED

Whether the respondent police officers are entitled to qualified immunity on the grounds that their conduct did not violate a clearly-established federal, constitutional, or statutory right of petitioner, and whether the petitioner's complaint failed to state a claim upon which relief could be granted against the respondent city where the complaint simply alleges that the city "permitted and encouraged its police officers to conduct themselves in a particular manner."

PARTIES INVOLVED

In addition to respondents Bruce Sucher, John Sands, Dee Hail, Gary Jackson, Ken Poff, Donald Evers, and the city of Vandalia, Ohio, the Imperial Casualty and Indemnity Company has a financial interest in the outcome of the case as insurers of all named respondents.

TABLE OF CONTENTS

	Page
QUESTION RESTATED	1
TABLE OF AUTHORITIES	III
REASONS FOR DENYING THE WRIT	1

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. *Creighton*, ___ U.S. ___, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)	1, 3
Dominque v. *Telb*, 831 F.2d 673 (6th Cir. 1987)	5
Harlow v. *Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)	1, 3
Hudson v. *Edmondson*, 848 F.2d 682 (6th Cir. 1988)	4
Malley v. *Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)	6
Monell v. *Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)	6
Monroe v. *Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)	3, 6
Moore v. *Kusper*, 465 F.2d 256 (7th Cir. 1972)	6
Pembaur v. *Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1985)	6
Red Cross v. *County of Rensselear*, 511 F. Supp. 364 (D.C.N.D.N.Y. 1981)	6

Page

State v. *DeFiore*,
64 Ohio App. 2d 115, 411 N.E.2d 837 (1979) 5

State v. *Wilson*,
41 Ohio App. 2d 240, 325 N.E.2d 249 (1974) 5

U.S. v. *Ruminer*,
786 F.2d 381 (10th Cir. 1986) 4

Other Authorities:

U.S. Constitution Fourth Amendment 4

42 U.S.C. § 1983 ..... 1, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-490

JOHN M. JAY,

Petitioner,

vs.

BRUCE SUCHER, JOHN SANDS, DEE HAIL, GARY JACKSON, KEN POFF, DONALD EVERS, and the CITY OF VANDALIA, OHIO,

Respondents.

OPPOSITION OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REASONS FOR DENYING THE WRIT

This case is an action brought by petitioner, John M. Jay, for money damages against the city of Vandalia, Ohio, and certain of its individual police officers for alleged violations of constitutional rights pursuant to 42 U.S.C. § 1983 and § 1988. The suit generally concerns the actions of the respondents in executing a search warrant at petitioner's residence on or about January 17, 1988. As part of their answer in the trial court, respondents raised the defense of qualified immunity as set forth by the United States Supreme Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) and *Anderson* v. *Creighton*, ___ U.S. ___, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

The facts before the trial court established that Vandalia police officer John Sands responded to a burglary complaint on the evening of January 16, 1988, to a residence at 803 Bright Avenue in the city of Vandalia, Ohio. Among the items reported stolen were a video cassette recorder (VCR) and a large jar of coins. During his investigation, Sands personally observed a trail of coins and VCR parts leading from the burglarized residence at 803 Bright Avenue to the rear of petitioner's residence at 823 Bright Avenue. Officer Sands also noted that entry into the burglarized residence had been achieved by use of a crowbar and, in addition to the trail of coins and VCR parts, he observed a crowbar lying on the ground near the back door of petitioner's residence. After a back-up crew had been summoned and arrived, Sands and officer Dee Hail knocked on the front door of petitioner's residence but detected no response nor sound from inside. Various officers then began continuous surveillance of petitioner's residence while officer Hail returned to police headquarters to prepare the necessary papers for obtaining a search warrant.

A search warrant was issued at 5:45 a.m. on January 17, 1988, by the Honorable Carl D. Kessler, Presiding Judge of the Montgomery County, Ohio, Common Pleas Court, upon the affidavit of officer Hail.

Upon Hail's return to the scene, at approximately 6:20 a.m., the officers knocked on petitioner's front door and announced their presence. Pursuant to a tape recording of the execution of the warrant, made by officer Gary Jackson, a delay of approximately ten seconds ensued between the knock and announcement and the forcing of the front door. Although petitioner contends that the time interval was five seconds, such calculation is based solely upon officer Ken Poff's report which states that the officers conducted a "five-second count" before forcing the door. However, it is clear from listening to the tape that the five-second count of the particular officer was followed by a radio communication

between the officers present which resulted in the additional time.

Respondents filed a motion for summary judgment and for limitation of further discovery with the trial court on June 1, 1988, which motions were decided in respondents' favor pursuant to Decision and Entry dated September 1, 1988. Notice of appeal was filed with the United States Court of Appeals for the Sixth Circuit on September 23, 1988. By unanimous decision, which was not recommended for full text publication, the Court of Appeals affirmed the decision of the trial court pursuant to Order dated May 31, 1989. Petitioner filed his petition for writ of certiorari with this Honorable Court on August 28, 1989. Said petition was returned for improper form and subsequently refiled and received by counsel for respondents on September 25, 1989.

The issue in the Courts below concerning the individual police officers was their entitlement to qualified immunity. The test for the application of qualified immunity was set forth by this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The relevant question is whether a reasonable police officer or officers, in the position of these officers, knew or should have known that their conduct was violative of a federal statutory or constitutional right, assessed in light of the legal rules that were "clearly established" at the time the conduct was taken. *Harlow* v. *Fitzgerald*, *Id.*, 457 U.S. at 818-819.

A complaint against a police officer for allegedly conducting an unreasonable search and seizure states a valid cause of action under 42 U.S.C. § 1983. *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). However, this Court has said that the right the police officer is alleged to have violated must have been "clearly established" in a more particularized sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Anderson* v. *Creighton*, *supra*, 97 L. Ed. 2d at 531.

Thus, it is not sufficient for petitioner to merely say that the actions of these police officers amounted to an unreasonable search and seizure and were, therefore, violative of his Fourth Amendment rights. Rather, the "clearly established" test must focus upon the particularized question of whether it was firmly established at the time of the execution of this specific warrant that a forcible entry by police into a suspect's residence when executing a warrant must be preceded by a specific period of time.

The trial court correctly reviewed and analyzed the status of the law in this area as it existed at the time of the subject search. As the court in *U.S.* v. *Ruminer*, 786 F.2d 381 (10th Cir. 1986) stated:

> Courts have upheld the validity of searches where the delay was one minute, thirty seconds, fifteen to twenty seconds, ten seconds, and forcible entry immediately after announcement has been upheld where there was likelihood of an attempt to escape, to resist, or to destroy evidence. A perusal of the cases shows the futility of fixing a hard and fast rule. The rule is not an inflexible one.

U.S. v. *Ruminer*, 786 F.2d at 384.

The question, then, is not whether ten seconds, or even five seconds, is a sufficient amount of time for the police to wait before making a forcible entry into a residence while executing a search warrant but, rather, the relevant question is whether the law in this area was so "clearly established" that, on an objective basis, these police officers or other police officers similarly situated should have reasonably known that their actions were unconstitutional. *See also*, *Hudson* v. *Edmondson*, 848 F.2d 682 (6th Cir. 1988). Given the status of the law in the area, it cannot be said that the contours of the alleged constitutional right were sufficiently clear so that a reasonable police officer would understand that by forcing the door after a ten-second delay he was violating a constitutional right of petitioner.

As the trial court pointed out, Ohio's "knock and announce" statute, which permits police officers to break down an outer door to a residence when executing a warrant, clearly demands the prerequisite of a knock and an announcement. What remains unclear is the interval of time that is permitted between the announcement and the forced entry. The burden is upon a plaintiff to come forward with such facts or allegations that show not only violations of his constitutional rights, but, also, that these rights were so clearly established when the acts were committed that any officer in a defendant police officer's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct. *Dominque* v. *Telb*, 831 F.2d 673 (6th Cir. 1987).

To this end, all that petitioner has presented to the courts below and now to this Court is a lower Ohio appellate court's interpretation of that state's knock and announce statute, which case construes such statute to permit police officers to infer that their admittance is refused under certain circumstances. *State* v. *DeFiore*, 64 Ohio App. 2d 115, 411 N.E.2d 837 (1979). The action of the present respondents in forcing the door was such that a reasonable officer could have believed it to be lawful in that, up to that point, there was no indication that anyone was at home, inasmuch as the police had knocked on the door one and one-half hours before the forced entry and elicited no response. This action was followed by continuous surveillance of the residence with no further indication of occupancy. *State* v. *Wilson*, 41 Ohio App. 2d 240, 325 N.E.2d 249 (1974).

Yet, regardless of the state court's interpretation of its own statute, petitioner's burden remains to show that respondents violated a "clearly established" *Federal* constitutional right. Although a state statute may govern the procedure to be used in the execution of a search warrant, the final determination of whether a particular search is constitutional must be made on the basis of Federal constitutional guarantees. To maintain his action under 42 U.S.C. § 1983, petitioner must allege

facts showing that these police officers acted to deprive him of rights, privileges, and immunities secured by the constitution and laws of the United States. He must allege more than the mere failure of state officials to follow state law, instead, he must show that these police officers acted in violation of a "clearly established" Federally-protected or constitutionally-guaranteed right. *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), *Moore* v. *Kusper*, 465 F.2d 256 (7th Cir. 1972). Although respondents maintain that their conduct was in full compliance with Ohio's knock and announce statute, petitioner's claims nevertheless fail to set forth "clearly established" *Federal* constitutional guarantees which respondents should have been aware of at the time of their alleged misconduct.

It should be further noted that qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Thus, the *Harlow* standard gives ample room for mistaken judgments. *Malley* v. *Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Because federal law did not clearly proscribe the actions of respondents, they are entitled to the immunity correctly granted to them by the courts below.

The sole allegation made against the respondent city was that the city permitted and encouraged the individual police officers to conduct themselves in the manner in which they acted. While petitioner need not state a particular statute or ordinance to evidence the policy or custom described in *Monell* v. *Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the liability of a municipality will only be for the injury inflicted by the execution of a government's policy or custom. In short, municipal liability is limited to actions for which the municipality is actually responsible. *Pembaur* v. *Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1985). The action of the municipality must be the kind that implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Under or-

dinary circumstances, a single incident of illegality will not infer an official policy unless it evidences deliberate indifference or gross negligence on the part of the municipal officials or their indifference to a pattern of misconduct. *Red Cross* v. *County of Rensselear*, 511 F. Supp. 364 (D.C.N.D.N.Y. 1981).

Petitioner has not pled, alleged, nor identified the existence of any such practice, policy, or decision to adopt a particular course of action. Neither has he identified the individuals responsible for implementing the same, or an official decision or tacit authorization approving harassment of petitioner. He has also failed to plead or allege a pattern of misconduct on the part of the individual police officers which would evidence a deliberate indifference by the city to ongoing police misconduct. Instead, the complaint alleges but a single incident for which the city should not be held liable on a respondeat superior basis. *Monell, supra*, 436 U.S. at 691. By simply alleging that the city has "permitted and encouraged its police officers to conduct themselves in a particular manner," petitioner has failed to meet the *Monell* standard.

Because federal law was not clearly established at the time of the actions of the respondent police officers, they are entitled to the qualified immunity granted to them by the trial court. Because petitioner has failed to plead or allege a particular policy or custom of the respondent city, or the execution thereof, petitioner's amended complaint against the city should be dismissed for failure to state a claim upon which relief can be granted.

Accordingly, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

David P. Williamson, Trial Attorney
BIESER, GREER & LANDIS,
of counsel
400 Gem Plaza, Third and Main Streets
Dayton, Ohio 45402
Telephone: (513) 223-3277
Attorneys for Respondents